# Department of Justice

TESTIMONY

OF

file: Identities

H. MILES FOY

SENIOR ATTORNEY-ADVISER

OFFICE OF LEGAL COUNSEL

BEFORE THE

GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS

SUBCOMMITTEE

of the

COMMITTEE ON GOVERNMENT OPERATIONS

HOUSE OF REPRESENTATIVES

FEBRUARY 28, 1980

WASHINGTON, D. C.

Mr. Chairman:

The duty to provide for the common defense is one of the primary duties of the Federal Government. I am here at your request to discuss a series of legal questions that have an important bearing on the performance of that duty. They all relate to the same problem -- the problem of preventing foreign governments or groups from gaining access to the scientific and technical information that makes modern warfare and terrorism possible. Your particular concern is with the Government's power to restrict access to technical information that has been created by, or is in the possession of, private citizens. What can the Government do to prevent foreign governments or groups from obtaining information having military significance that originates in private sources?

In your invitation to the Department you asked that we address six or seven specific issues that are presented in one way or another by the previous attempts of Congress and the Executive Branch to deal with this problem of access. Before I discuss these issues, I would like to say a word about the general legal framework, particularly the constitutional framework, in which our analysis must proceed. This is a difficult field. In this brief statement I will confine myself to a few simple points.

The earliest cases that arose under the First Amendment established a general constitutional rule that is still good law: There are circumstances in which the Government may prohibit the dissemination of private information by private individuals. To be sure, these early cases did not involve information of the kind that concerns the Committee today -- information of a scientific or technical nature. They involved private information of a more sensitive sort -- information setting forth private views regarding matters of fact and opinion disseminated for the purpose of influencing political conduct. The teaching of these early cases is that in unusual circumstances the Government may restrict the dissemination of private information by imposing an appropriately drawn statutory prohibition and enforcing the prohibition through the normal processes of the criminal law.

The case of Eugene Debs is instructive. In 1918 Debs rose to convey to the people of Canton, Ohio, his views regarding their duty to accept military service for the war in Europe. The speech was his own. It disseminated facts and opinions tending to support the proposition that members of the working class should not fight wars instigated for the benefit of their economic masters. Debs was indicted on a charge that he had obstructed the recruitment and enlistment services of the United States. He was tried and convicted, and his conviction was affirmed by the Supreme Court.

In an opinion by Mr. Justice Holmes, the Court held that in light of all the circumstances of the case the dissemination of this information by Debs, reflecting nothing more than his own views regarding the facts and moral principles relevant to the war, had in fact created a clear and imminent danger that a necessary defense process -- military recruitment -- would be obstructed. Because this was a danger that the United States was entitled to prevent, the First Amendment did not bar the prosecution. See Debs v. United States, 249 U.S. 211 (1919).

First Amendment law has undergone a good deal of refinement since the days when these early precedents were laid down, but the principles identified by Mr. Justice Holmes still provide a framework for an analysis of the limitations on the power of the United States to restrict the dissemination of private information affecting the Nation's ability to maintain a common defense against foreign military power. To be sure, these principles are not technical rules for adjudication; but they focus the constitutional inquiry on the issues that must be addressed by those who hold, as the courts have consistently held, that the First Amendment is not "an absolute." Given the compelling interest of the United States in maintaining an effective defense, what danger does the dissemination of the information in question create? How great is the danger? How clear is it? How

closely does it follow from the dissemination of the information itself? Does the danger, in light of all of the facts and circumstances of the case, justify the sort of prohibition that the Government has sought to impose?

This brings us to the second major point. The courts have held repeatedly that if the Government wants to prohibit the dissemination of information, even information in the field of military affairs, there is a fundamental constitutional difference between two different modes of procedure. There is a difference between, on the one hand, enacting a statute that prohibits dissemination and provides for enforcement through the normal mechanisms of the criminal law and, on the other hand, obtaining a court order that imposes a like prohibition in a particular case or cases and holds out the prospect of enforcement through a proceeding for criminal contempt. The uninitiated may ask why this procedural difference makes such a great constitutional difference. I will not pursue that inquiry here. The courts have held that it does. The general rule is that an injunction against private speech cannot be justified constitutionally except in cases in which the speech presents a danger of extraordinary magnitude. By contrast, a criminal prosecution under a statute prohibiting the same speech can be justified by a lesser showing.

I should note in passing that it has become increasingly clear that there is one rather significant ex-

ception to the rule against injunctive relief. When the information in question is protected by a contract between the Government and someone who has gained access to the information through a position of trust, an injunction against dissemination by that person may be appropriate even where there is no proof that dissemination creates a grave and extraordinary danger.

I have two further observations to make before proceeding to your specific questions. As your letter suggests, information relating to or affecting military affairs can have its genesis in many different sources. It can originate "in" the Government itself. It can originate in a private laboratory. It can originate, as in Debs, in the mind of an influential dissident opposed to a foreign war. Does the source or origin of information have a bearing on the power of the Government to restrict its dissemination? We think that it does, but we should emphasize that in our view the question of sources is simply one of many considerations that must be taken into account in determining what the Government's powers are in a given case. One of the important questions is the question of danger. Does the dissemination of the information create a danger sufficient to justify restrictive action? The source of the information may bear on that question. If the information derives from a source open to public examination (e.g., the New York

Public Library) it may well be that dissemination of the information will open no new danger, given the source. The information is already known. Additional dissemination will provide our foreign rivals with nothing they do not already have or could not soon discover. See United States v. Heine, 151 F.2d 813 (2d Cir. 1945), cert. denied, 328 U.S. 833 (1946). But the inquiry is largely one of fact, and we think there are cases in which the danger created by dissemination of information that has originated or come to rest in private sources is sufficient to trigger the Government's power to act in the common defense. If the Manhattan Project had proceeded under private, not public, sponsorship, the governmental interest in preventing premature disclosure of its startling and dangerous discoveries would have been just as compelling; and the power of the Government to prevent that danger would have been very nearly as great, in our view.

I have one final word. In any discussion of the Government's power to restrict the public or private dissemination of information affecting military affairs, there is an occasional temptation to draw on the private-law concepts that the courts have developed to deal with private transactions involving "intellectual property." I do not deny that this may be a useful exercise in some cases. Indeed, the Government can and does from time to time acquire "owner-

ship" rights in "intellectual property" in the private-law sense, just as it can and does acquire rights in land, when acquisition is necessary in the due performance of a proper Government function. But if our aim is to determine the parameters of the Government's power under the First Amendment, the analogy to the private law is imperfect at best, and in some cases it can be positively misleading. The Pentagon Papers case (New York Times v. United States, 403 U.S. 713 (1971)) provides an especially clear illustration of what I mean. Much of the information at issue in that case was secret information concerning war-related matters of great and legitimate concern to the Government. This information had been generated within the Government by Government employees for Government purposes. It had been committed to paper, and these papers had been purloined. It would have been possible in that case to make a very persuasive argument that this information, or much of it, was "Government property" in the best common law sense; but that sort of analysis played little or no role in the Court's treatment of the legal issue presented by the effort to enjoin the publication. To be sure, in the private-law context the chancellor's injunctive remedy is a traditional and proper remedy for conversion or misappropriation of "intellectual property." But in the Pentagon Papers case the First Amendment doomed the Government's effort to impose an equitable restraint against publication of its own documents.

I will conclude this preliminary discussion with the observation that the use or misuse of concepts borrowed from property law can mislead us in the other direction as well. In Debs and in some of the other cases that have upheld prohibitions against the dissemination of information by private persons, the information in question was not Government property, nor was it capable of becoming Government property in any meaningful sense. This was not decisive. The Government was not obliged to "acquire" the information in order lawfully to forbid its dissemination. If the dissemination created a danger that clearly and immediately threatened a necessary defense process, and if the danger was otherwise sufficient to justify the prohibition, the Constitution gave the Government power to impose the prohibition.

I now turn to your specific questions.

I.

You have asked a series of questions involving the Invention Secrecy Act, 35 U.S.C. § 181 et seq. This Act, as you know, establishes a procedure under which a patent may be withheld when its issuance would be detrimental to the national security. The Act provides that an applicant whose patent is withheld pursuant to this procedure shall be entitled to compensation; and it also provides that the applicant, on pain of criminal liability, may not disclose his invention without due authorization. See 35 U.S.C. §§ 183, 186.

You have inquired whether the Department participates in the review process that determines whether an application shall be subjected to the secrecy procedure in the first instance. You have asked whether the Department plays any role in the applicant's effort to secure compensation in the event that he is subjected to the procedure. You have also asked whether in our view there are any provisions of the Act that suffer constitutional infirmities under the First or Fifth Amendments.

As regards the first two questions, the answers are straightforward. The major role the Department of Justice plays in the enforcement of the Act is the role of defending the United States in "just compensation" suits brought in either the Court of Claims or the District Court under § 183. With the exception of providing informal advice when requested, the Department plays no role in the administrative proceedings before the Patent Office. Although the Department has been designated a defense agency for purposes of § 181, it does not ordinarily review patent applications to determine whether a secrecy order should be imposed. The Department has requested that a secrecy order be imposed on only three occasions. All three requests were made with respect to applications filed in 1952 and 1953 for inventions developed within the Federal Bureau of Investigation.

Your question whether any provision of the Act suffers constitutional infirmities under the First or Fifth

Amendments is more difficult. The Department frequently expresses public views on general constitutional issues and on specific questions presented by legislative proposals. The Department routinely takes positions on constitutional questions in litigation. In the absence of litigation, the Department will occasionally express public views on the constitutionality of statutes in force, especially where the issue is one of separation of powers or where the answer to the constitutional question is clear in light of a definitive judicial opinion on the subject. But the primary duty of the Department is to defend and enforce the Acts of Congress, and for that reason the Department has thought it wise to follow a rule of self-restraint in expressing public views on constitutional questions presented by the statutes we are called upon to enforce. See 39 Op. A.G. 11 (1937); 38 Op. A.G. 252 (1935); 40 Op. A.G. 158 (1942). There are three reasons for this rule. First, when a statute has been passed by both Houses of Congress and approved by the President, the Attorney General cannot give an opinion on the constitutionality of the statute without placing himself in the position of judging and possibly vitiating the constitutional judgment of the two elected branches. Second, the constitutionality of a statute may be difficult to determine in the abstract without the benefit of examining the specific factual situations that can give rise to a constitutional challenge.

Finally, if the Attorney General expresses doubt about the constitutionality of a statute, he may find himself at a disadvantage when he is later called upon to discharge his duty to defend the statute in court.

The present case is an appropriate case for the application of this rule. As regards the First Amendment questions, it is perfectly true that any flat prohibition on private speech raises an issue under the First Amendment, but we are dealing here with a prohibition, § 186, that has never been tested. There has never been a prosecution under § 186. We have no judicial opinion to guide us. In advance of litigation, undisciplined by facts, the expression of views on the First Amendment issues that might be presented by a prosecution under this statute would be difficult in any event and would be either self-serving or prejudicial from the standpoint of the Department's duty to enforce the statute. As regards the Fifth Amendment issues, I note simply that the statute provides both an administrative and a judicial remedy for damages caused by the secrecy procedure.

II.

The second set of questions concerns the International Traffic in Arms Regulation (ITAR), 22 CFR § 121 et seq. This regulation implements § 38 of the Arms Export Control Act, 22 U.S.C. § 2778, which gives the President broad authority to

identify and control the import and export of defense articles and defense services, to designate items to be considered defense articles and defense services, to promulgate regulations controlling the import and export of these items, and to provide foreign policy guidance to persons involved in commerce of this sort. The Department of State, through the Office of Munitions Control in the Bureau of Political-Military Affairs, has been delegated the responsibility for administering the regulatory scheme. The Act provides that any violation of § 38 or of the regulations promulgated under it shall be punishable by fine or imprisonment. 22 U.S.C. § 2778(c).

The ITAR regulates the exportation, not only of devices and implements of war, but also of technical data relevant to the design, production, and use of those devices. It imposes this regulation by requiring that transactions in arms and data be licensed. As regards data, the ITAR was drafted so broadly that it could have been interpreted to extend, not only to the transmission of technical information in private commercial transactions across national boundaries, but also to the noncommercial expression or communication of technical information in public settings in which the information might be expected to reach foreign nationals (scientific symposia, etc.). In a word, it could have been interpreted to impose a general restraint on the communication of technical data by requiring pre-transmission or pre-publication review of the data through a licensing system.

Recent developments have shed light on the application and function of this system of regulation. First, perceiving that an expansive interpretation of the technical data provisions could impede scientific publishing and exchange, thereby presenting serious difficulties under the First Amendment, the U.S. Court of Appeals for the Ninth Circuit has provided us with guidance regarding the circumstances in which an individual may be punished for refusing to comply with the licensing scheme for technical data. The Ninth Circuit has said that refusal to comply with the licensing scheme may be punished only when the violator (1) knowingly assists a foreign enterprise in the manufacture or use of defense items or services on the Munitions List (2) by supplying the enterprise with technical information significantly and directly related to those items or services (3) knowing that the information is intended for that use. In other words, the technical data provisions, so construed, do little more than impose a system of restraint on individuals and firms in this country who want to aid and abet foreign concerns in the manufacture and use of items of war. See United States v. Edler Industries, No. 76-3370 (9th Cir., July 31, 1978).

The clear implication of the Ninth Circuit's opinion is that although this sort of prohibition may impose a restriction on the transmission of information (among other

things), it can be sustained on the same legal theory that sustains (1) the familiar restrictions on the communication of information in the commission of domestic offenses (e.g., knowingly aiding and abetting in arson by showing the perpetrator how to construct the incendiary device), as well as (2) the traditional restrictions relating to international transactions in information (e.g., providing foreign governments with important information about our military defenses). See Gorin v. United States, 312 U.S. 19 (1941). In a word, traffic in "technical assistance" in this setting is not constitutionally protected speech, in the Ninth Circuit's view; and the restriction of transactions involving technical assistance through a licensing system does not give rise to constitutional concerns under the First Amendment.

The Department of State has indicated that it too interprets the ITAR narrowly. It will not, for example, attempt to apply the regulation to bona fide domestic publication of technical data by scientists or others. As construed by the Office of Munitions Control, the regulation applies primarily to the private transmission of technical data in commercial transactions with international implications. This interpretation seems to be consistent with the Ninth Circuit's interpretation of the scope of the criminal prohibition. The ITAR is intended to regulate the direct and knowing assistance of foreign enterprises in the manufacture and use of defense articles and defense services.

Both of these developments (the Edler case and the State Department's interpretation of the regulation) do much to allay the legitimate constitutional concerns that might otherwise be provoked by a general program of licensing directed at commerce in scientific ideas.

III.

Finally, you have asked a series of questions having to do with the power of the Government to acquire "proprietary interests" in intellectual property important to the national defense. You note that the Executive Order on classification forbids classification of privately owned information but contemplates that the Government will from time to time obtain "proprietary interests" in the fruits of non-Government research. The Executive Order authorizes classification once that has occurred. How does the Government acquire such a "proprietary interest"? Does the Government take title? Does the Government assert a peacetime power of emminent domain over intellectual property absent some statute that authorizes involuntary acquisition?

These are complicated questions. To simplify the problem, let me shift the focus of the inquiry to some degree. I have suggested that property law concepts do not always provide infallible guidance when we attempt to discover the nature and limits of the Government's powers in

this area. I want to renew that argument here. The essential problem is not to determine how and when the Government may obtain "title" or other incidents of "ownership" in intellectual property in the private-law sense, but to determine how and when the Government may assert a right to prevent or punish the dissemination of defense-related information in the possession of private individuals, preventing them from using it or exploiting it for their own private purposes. How and when may the Government acquire and assert such a right?

Recognizing the complexity of the subject, the short answer is the following: The Government may acquire and assert such a right under a properly drafted criminal statute where the danger presented by the disclosure is sufficient to justify the prohibition. Absent a statute, the Government may in rare circumstances assert such a right in a suit for an injunction against a disclosure that will present a grave danger to the national defense. Absent a grave danger, the Government may in some circumstances enjoin a disclosure of information protected under an agreement or special relationship between the Government and the individual in question. As against a stranger, in the absence of a statute or an extraordinary danger, the Government may have no remedy at all.

I will now attempt to answer any questions you may have.